CETICO SDN. BHD.

v.

THE TROPICAL VENEER CO. BHD.

HIGH COURT MALAYA, JOHOR BAHRU
MAHADEV SHANKAR J
[COMPANIES WINDING-UP NO. 42-57 OF 1986]
27 OCTOBER 1986

COMPANY LAW: *Winding up of company - Application for dismissal or stay of proceedings by debenture holders - Whether debenture holders' wishes should prevail over unsecured creditors - Debenture holders' opposition to petition - Not filed within time limit stated in r. 30 of the Companies Winding-Up Rules - Effect.*

This was an application by the United Malayan Banking Corporation, debenture holders of the respondent company, for the dismissal or a stay of a petition by the petitioner to have the respondent company wound up.

At the hearing of the petition, 16 other unsecured creditors apart from the petitioner appeared after giving due notice of their intention to support the petition. The total amount due to the unsecured creditors was about RM1,636,000.

On 4 November 1985 the Bank had appointed Receivers of the company as the financial position of the company had become precarious. The petitioner's solicitors served the statutory demand on 22 May 1986 pursuant to s. 218 of the Companies Act for the sum of RM154,533.09 being the balance purchase price of diesel sold and delivered to the company. The debt was unpaid and on 21 June 1986 the petition was filed. The petition was duly served on the company on 10 July 1986 and gazetted on 17 July 1986 and advertised in the national newspapers on 30 and 31 July 1986.

On 9 July 1986 the Receivers and Managers entered into an agreement with Panma Heavy & Chemical Equipments Sdn. Bhd. for the purposes of extracting timber from a concession granted to the company in Trengganu. They then prepared a report and projected profit to be derived from the continued operations of the company from 1986 to 1990. These operations were however based on several assumptions, one of which was that the Yayasan Trengganu would grant the company an additional 10,000 acres.

By 11 August 1986, 11 unsecured creditors had filed notices of intention to appear and support the petition. The petition was postponed from 25 August 1986 and was heard on 13 October 1986. The Receivers had between the last hearing date and the present hearing date circulated a scheme of arrangement amongst the unsecured creditors. They were told that if the company was wound up, they would receive nothing but if the company was allowed to continue it would be possible that the Bank would be able to recover the whole of its secured debt and the unsecured creditors would also recover the part if not all of the amounts owed. However the proposal was that only after the Bank had been paid the whole of its loan would the balance be distributed proportionately amongst the unsecured creditors.

Ninety-seven unsecured creditors whose debts totalled RM1,275,059.50 agreed. The bulk of them however were owed only small sums of money. The Court then asked whether the solicitors appearing for the supporting creditors agreed or not to the stay. Their unanimous response was that the company should be wound up.

Held:

[1] Relying upon the observations in *The Law of Company Liquidation* by McPherson (2nd Edn.) (1980), the duty of the Court was clear in that "Where the company is insolvent the foremost consideration naturally is in the interests of the creditors ... As regards creditors, more importance attaches to the views of the unsecured creditors ... (as) ... they have no means other than winding-up by which they can obtain payment of their debts."

[2] The unanimous wishes of the unsecured creditors must therefore prevail over the Bank otherwise the unsecured creditors would have no control over the manner in which the company is run and they would have no right of access to any information as to how the company is disposing off its assets.

[3] As regards the agreement entered into with Panma, the Court could not ignore the fact that the scheme was not based on altruistic motives and that there was a loss of RM1,694,000 in 1986 made by the company and it was therefore impossible to predict with any certainty that the anticipated profits from 1987 to 1990 would materialise as a matter of course.

[4] The application was dismissed and an Order in Terms of the petition was made. Further order was made that the costs of the application be taxed and paid by the Bank to the petitioner and supporting creditors.

[5] Leave to appeal to the Supreme Court was granted and a stay of the winding-up order was asked pending disposal of the appeal. The application for stay was dismissed on the ground that the unsecured creditors wished the Official Receiver to take possession soonest possible.

Cases referred to:
Re P. & J. Macrae [1961] 1 WLR 229
Re Crigglestone Coal Company [1906] 2 Ch 327

Legislation referred to:
Companies Act 1965, ss. 186, 190, 218
Companies (Winding-up) Rules 1972, rr. 28, 30

Other sources referred to:
The Law of Company Liquidation, McPherson, 1980, 2nd Edn.

For the petitioner - Ong Ban Chai; M/s. Ong Ban Chai & Co.
For the debenture holders (UMBC) - P.S. Gill; M/s. Gill & Tang

JUDGMENT

Mahadev Shankar J:

This is an application for the dismissal or the stay of a petition by Cetico Sdn. Bhd. ("Cetico") to have The Tropical Veneer Co. Bhd. ("the company") wound up.

The United Malayan Banking Corporation ("the Bank") are debenture holders of the company. On 30 September 1986, the Bank was owed RM8,990,868. As at 30 September 1985, the amount stated in the company's books to be owing to its unsecured creditors was about RM6,640,013.

At the hearing of the petition, apart from Cetico, 16 other unsecured creditors appeared after giving due notice of their intention to support the petition. Together with the petitioner the total amount due to these unsecured creditors is roughly about RM1,636,000. Putting it quite simply, the issue that I now have to decide, is whether I ought to dismiss or stay this petition merely because the Bank is opposed to the making of the winding-up order because their Receivers and Managers are of the opinion that if the company is allowed to continue trading, they could hopefully make enough money to pay off all the company's debts by the year 1990.

Mr. Paramjit Singh Gill who appeared on behalf of the Bank's Receivers and Managers had presented a most eloquent argument as to why the Bank's wishes should prevail over that of the unsecured creditors. In the present economic climate, the issues raised is one of some public importance and it is desirable that I should now proceed to give my reasons in full for the order which I will shortly be making.

The company was incorporated in 1964 with an authorised capital of RM50 million and a paid-up capital of RM11 million.

The debentures to the Bank were created in 1971 and in 1979.

On 4 November 1985, the financial position of the company had become so precarious that the Bank appointed M/s. Toby Lam and Rohailan Mohamed to be Receivers and Managers of the company. Mr. Ong Ban Chai, Counsel for the petitioner, has submitted that these Receivers and Managers have not complied with s. 186 of the Companies Act ("the Act") which required notice of the appointment to be filed with the Registrar within 7 days, and s. 190 of the Act which required detailed accounts to be filed within 1 month after the expiration of the period 6 months from the date of the appointment. If these omissions have in fact occurred, they can be made the subject of an investigation by the proper authorities in due course. They have no direct bearing on the issues which I now have to decide.

On 22 May 1986, Cetico's solicitors served the statutory demand pursuant to s. 218 of the Act on the company to pay up RM154,533.09 being the balance purchase price of diesel sold and delivered to the company. The debt was not paid, and on 21 June 1986 Cetico filed its petition. The petition was indorsed with an order that it be heard in this High Court on 25 August 1986.

On 10 July 1986 the petition was served on the company. It was gazetted on 17 July 1986 and advertised in the national newspapers on 30 and 31 July 1986.

It follows, therefore, that the company, the Bank, and the Receivers and Managers must have known that winding-up proceedings were pending in the Johor Bahru High Court by those dates.

On 9 July 1986, the Receivers and Managers entered into an agreement with Panma Heavy & Chemical Equipments Sdn. Bhd. for the purposes of extracting timber from a concession which had been granted to the company in Trengganu. On 7 August 1986, the Receivers and Managers prepared a report setting their assumptions and the projected profit to be derived from the continued operations of the company. They hoped to realise a profit of RM394,000 in 1986, RM2,715,000 in 1987, RM3,719,000 in 1988, RM4,918,000 in 1989, and RM5,993,000 in 1990. But these expectations were based on several assumptions, one of which was that the Yayasan Trengganu would grant the company an additional 10,000 acres to the 40,000 acres which the company had already worked out.

By 25 August, 11 unsecured creditors had filed notices of intention to appear and support the petition. There were no notices filed in opposition at that time.

The petition was not heard on 25 August 1986. It was postponed to 13 October 1986 and written notice to this effect was given to all parties concerned by the Senior Assistant Registrar of this Court on 24 September 1986.

The petition was then once again advertised in the newspapers and the new date of hearing made known to the public.

Rule 30 of the Companies Winding-Up Rules ("the Rules") provides that affidavits in opposition to a petition that a company may be wound up, shall be filed, and a copy thereof served on the petitioner at least 7 days before the time appointed for the hearing of the petition.

The notice of intention to appear, however, need only be given by 12 noon on the day preceding the hearing: See r. 28.

The remaining unsecured creditors all filed their notices in good time.

But it would appear that the Bank's notice of intention to appear was sent from Kuala Lumpur on 10 October 1986 and did not reach the Court until 14 October 1986. Furthermore, on the morning of the hearing, the Bank's solicitor filed a voluminous affidavit affirmed by Dr. Steven Leong, a Senior Officer of the Bank.

There is plenty of authority to the effect that the Court has a very wide discretion as to what order it will make on a winding-up petition. But it must be said, and with the strongest emphasis, that afiling voluminous affidavits on the morning of the hearing, is not calculated to inspire confidence in the *bona fides* of its deponents or their advisers. All the facts and figures contained in Dr. Steven Leong's affidavit were available to the Bank, and the Receivers and Managers, months before the hearing. If due notice is not given, the Winding-Up Rules provide for the Court to disallow a person to appear without special leave.

In all the circumstances of this case, however, I granted a short adjournment in order to permit the petitioner and the supporting creditors some small opportunity of familiarising themselves with the contents of the Bank's affidavit and enclosures.

That done, the petitioner and the supporting creditors were unanimous in their request that the winding-up order be made.

Apart from the hopes and expectations of the Receivers and Managers based upon their projection of anticipated profits, it was alleged for the Bank that the largest unsecured creditor was Malayan Adhesive & Chemical Sdn. Bhd. to whom the amount owing was RM1,288,599.23 and that discussions had taken place between them and the Receivers and Managers and that they had agreed to supply chemicals for the continued manufacturing operations of the company. It was said that this creditor had indicated its willingness to consider some scheme of arrangement for the further management of the company. I place little or no weight on this. This particular unsecured creditor did not appear in Court, and I am not prepared to accept hearsay evidence on what they may or may not be prepared to do. In any case, the general state of the market is such that its current philosophy is embodied in the maxim, "In God we trust, everyone else pays cash". It does not seem to me a reasonable inference that this creditor would continue to supply chemicals other than for cash.

So, what it then came down to was that because Cetico's claim only amounted to approximately 2.33% of the total unsecured creditors and about 1% of the total amount of the secured and unsecured debts, this Court should have primary regard to the wishes of the Bank.

Here again, this Court cannot ignore the fact that the scheme proposed is not wholly based on altruistic motives. The Bank, and the Receivers and Managers have no doubt formed the view in their own, quite natural, material instincts that if the petition is dismissed, they will get something and perhaps in due time everything, from whomsoever is providing the money, and their argument is that if the company is wound up, the unsecured creditors will find an absence of anything available for them.

But as the figures in the projected profit show, the general administration, financial expense, and selling and distribution expenses (which would presumably include the fees payable to the Receivers and Managers) range from RM1,104,000 in 1986 and rise to a figure of

RM2,589,000 in 1990. There was a loss of RM1,694,000 in 1986 and I am unable to predicate with any certainty that the anticipated profits from 1987 to 1990 will materialise as a matter of course.

The other problem here, is that, if the winding-up order is not made, the unsecured creditors will have no control over the manner in which the company is run and they will have no right of access to any information as to how the company is disposing off its assets.

Perhaps, it is not entirely irrelevant, to observe that Dr. Steven Leong's affidavit was not accompanied by an up-to-date auditor's report by way of a balance sheet and a profit and loss account, so as to present a true and fair view of the present financial situation of the company.

As solicitor for one of the supporting creditors, Miss G.F. Liow stated from the Bar Table that for tax purposes, a public company which had sustained losses may in fact be worth a considerable amount on the open market if it is sold as a going concern. For what it is worth, I have taken note of this.

In *Re P. & J. Macrae* [1961] 1 WLR p. 229 it was held that the bare fact that the opposing creditors were in a majority was not of itself sufficient, still less conclusive, to require a Judge to exercise his discretion in their favour. But this was a case where every unsecured creditor who appeared, supported the petition. The Bank was alone in its opposition to it. Does the mere fact that they were owed about RM3 million more than the unsecured creditors make such a difference?

The Court is obliged to Mr. Gill for making available, *The Law of Company Liquidation by* McPherson (2nd Edn.) (1980). With respect, it seems to me, that the author's comments are most helpful.

At p. 55 it is stated:

> There are, in fact, certainly no more than five, and probably only four, reasons which will justify the Court in refusing to make an order on the petition of an unpaid creditor. These are that (1) the petitioner's debt amounts to less then £100; (2) the debt is *bona fide* disputed by the company; (3) the company has paid or tendered payment of petitioner's debt; (4) winding-up is opposed by other creditors; and (5) the company is in the process of being wound up voluntarily.

At p. 61 and 62 it is stated:

> Opposition to winding-up may proceed from the petitioner's fellow creditors, who may be secured or unsecured, or from the company or (what is virtually the same thing) from the shareholders. The significance of opposition to winding-up varies in direct proportion to the relative importance of the opposing interests involved. Where the company is insolvent the foremost consideration naturally is in the interests of the creditors, and these prevail over the interests of other persons likely to be affected by the winding-up, such as the company and shareholders. As regards creditors, more importance attaches to the views of the unsecured creditors for the obvious reason that, unlike the secured creditors, they have no means other than winding-up by which they can obtain payment of their debts.

And at p. 64 it is stated:

> Obviously the general or unsecured creditors are the ones most likely to be affected by the refusal to make an order, for it will deprive them of what is virtually their only remedy against the company. It follows that their wishes in the matter are, as against those of other creditors, entitled to primary consideration. (*Re Airfast Services Pty. Ltd.* [1976] 2 ACLR)

After dealing with the case of *Re Crigglestone Coal Company* [1906] 2 Ch 327, the author continues:

> For practical purposes the debenture holders in this case were virtually in the same position as shareholders since they had an obvious interest in ensuring that the company and its business were continued so that the profits earned could be used to discharge the company's liabilities for principal and interest on the debentures. In circumstances such as these it would be most unjust to refuse the order since a secured creditor, when he makes his loan, bargains to receive security as his protection against loss in the event of winding-up and it would not be right to give him the power to impair the remedy which exists primarily for the benefit of unsecured creditors. However, the decision probably does not go so far as to establish that the wishes of unsecured creditors in the matter of winding-up will invariably be preferred to those of creditors who are secured, although this is likely to be so in all cases except those where the injury which winding-up will inflict upon the latter is out of all proportion to the benefit it will bestow on the former.

Relying upon these observations, it seems to me that the duty of this Court is clear. In all the circumstances of this case, the unanimous wishes of the unsecured creditors must prevail over the Bank, who can have their cake and eat it.

As I have indicated earlier, these proceedings were in the public knowledge for some months now. Had the Bank and the Receivers and Managers acted in good time so as to put the unsecured creditors in a position in which they could have made an informal appraisal of their chances of recovery of some portion of their losses, and if some acceptable profit sharing arrangement had been broached so that the unsecured creditors were not made to feel that they were being pressured into sacrificing their only remedy in exchange for the eligibility of standing in the queue 4 years from now, this Court may have been disposed to look at the matter differently.

On the material before me, however, and with respect to Mr. P.S. Gill, who has said everything which could have been said for the Bank, the only order that I can make is to dismiss his application and to make an order in terms of this petition.

I further order that the costs of this application shall be taxed and paid by the Bank to the Petitioner and the Supporting Creditors.

Supplementary Judgment

On 27 October 1986 just before judgment was delivered, Mr. Gill, Counsel for the Bank, sought to introduce some further evidence in order to persuade the Court that the petition should be stayed or dismissed.

From any point of view, this material was being placed before the Court too late. Nevertheless in the interest of all concerned, I permitted this material to be put on file in case they may prove to be of assistance in any further consideration of this problem.

At the risk of some distortion, owing to the totally inadequate opportunity afforded to consider the documents in detail, it appears to me that their effect is as follows.

The Receivers between the last hearing date and today are said to have circulated a scheme of arrangement amongst the unsecured creditors. In effect they were told that if the company was wound up, they would get nothing, but if it was allowed to continue it would be foreseeable that the Bank would be able to recover the whole of its secured debt and the unsecured creditors would also recover part if not all of the amounts owing to them. However, the proposal was that only after the Bank had been paid the whole of its loan, would the

balance be distributed proportionately amongst the unsecured creditors. The response required to this offer was that the unsecured creditors should not commence any proceedings against the company and that they would accept whatever, if any, fell to be distributed in due course.

Ninety-seven unsecured creditors whose debts totalled RM1,275,059.50 are said to have agreed. The lists furnished of these creditors and the amounts they are owed, show that the bulk of them are due small sums of money which it would not be worth powder and shot to pursue. One of them is actually owed 50¢. Only four of them have claims in excess of RM50,000 and below RM100,000.

It will be recollected that the total value of the debts due to the supporting creditors who have appeared in this Court was roughly RM1,636,000.

Mr. Gill further stated that Malayan Adhesive & Chemical Sdn. Bhd. had accepted the scheme of arrangement in principle, and produced a letter from their solicitors, M/s. Skrine & Co. in support of this statement. But on reading the letter it is observed that this company had not accepted The scheme of arrangement proposed by the Receivers. They were in principle only prepared to accept A scheme of arrangement. But before they did so, they required the last two financial accounts consisting of the balance sheets and profit and loss accounts for study. In other words, the largest single creditor was keeping all his options open.

Next was produced a letter from the EPF dated 24 October 1986. This letter is marked "without prejudice" and its admissibility is open to question. However upon reading the letter, it is observed that the EPF was only prepared to accept the scheme on condition that the EPF ranks in priority. In other words they were saying that they wanted to be paid off first i.e. even before the debenture holders. There are references in the letter to criminal offences committed which have not been elaborated upon.

The attitude of this Court to all this new material was simple. The solicitors appearing for the supporting creditors were asked whether they agreed to a stay or whether they were still insisting that the company be wound up.

Their unanimous response was that the company should be wound up and accordingly I delivered the judgment so providing.

Leave to appeal to the Supreme Court was then applied for, *ex abundanti cautela,* and I readily granted it.

A stay of the winding-up order was then asked pending disposal of the Appeal.

This was objected to on the ground that the unsecured creditors wished the Official Receiver to take possession soonest possible. I agreed and I dismissed the application for stay.

No doubt if the additional material provide by Counsel for the Bank is going to influence the decision, it would be best considered in the Supreme Court by which time all concerned would have had an adequate opportunity of looking at the implications.

In retrospect, having had an opportunity of reading the new material provided, I am constrained to state that there is nothing in them which would have caused me to decide otherwise than I have done in making the winding-up order.

Also found at [1987] 1 CLJ 170